

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

PacifiCorp

)

Project No. 2342

**RESPONSE OF KLICKITAT AND SKAMANIA COUNTIES TO
PACIFICORP'S PETITION FOR DECLARATORY ORDER ON PREEMPTION**

Pursuant to Rule 213 (d)(2) of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.213(d)(2)), Klickitat and Skamania Counties, Washington (collectively, "Counties"), intervenors in the above-captioned proceeding, hereby submit their answer to the Petition For Declaratory Order On Preemption ("Petition") filed herein by PacifiCorp ("PC") on October 14, 2005. As discussed below, the Commission should deny PC's extraordinary attempt to sweep aside all laws enacted to protect the citizens and resources of the Counties.

SUMMARY

In its Petition, PC asks the Commission to declare that Part I of the Federal Power Act ("FPA") preempts every state and local law providing the Counties with the authority to review and issue permits related to PC's proposal to decommission and remove the Condit Hydroelectric Project No. 2342 ("Condit"). PC proposes a "blow and go" approach to dam removal: PC would blow a hole in Condit dam, immediately flush over *1.57 million cubic yards of sediments* downstream into the White Salmon and Columbia Rivers, and then remove the dam. As documented in previous filings by the Counties, PC's "blow and go" approach will cause devastating adverse impacts to fishery species listed under the Endangered Species Act, their critical habitat, and other environmental resources, will have significant adverse consequences for the local economy, and will result in the replacement of a picturesque lake enjoyed by the

Counties' residents and visitors with an ugly gash of crumbling sediment banks. For these reasons, the Counties have vigorously opposed PC's proposal.

In 1999, PC entered into a Settlement Agreement ("SA") with various parties regarding its removal proposal and asked that the Commission approve the SA "without modification." Under the SA, PC is required to obtain all "applicable federal, state, regional, and local permits" associated with its proposal. Since then, PC has informed the Commission and the Counties on numerous occasions, including as recently as an April 2005 meeting with a Klickitat County Commissioner, that it would be filing applications with the Counties for associated permits required by state and local laws. Now, with the filing of its Petition, PC has revealed that it has been misleading the Commission and the Counties for six years: it never intended to act consistently with the SA provision and PC's repeated representations, never intended to obtain any permits from the Counties, and wants the Commission to help it summarily sweep aside the very state and local laws with which PC had repeatedly claimed it would comply.

The Counties respectfully request that the Commission deny PC's Petition for the reasons set forth in the Statement of Issues set out below.

STATEMENT OF ISSUES

1. The Commission should require PC to honor its commitment in the SA to obtain all "local permits" and should not reward it for misleading the Commission and the Counties for six years. Requiring compliance with this commitment also would be fully consistent with the Commission's practice in past dam removal cases where it has required licensees to *obtain* all local permits (*Wisconsin Electric Power Co.*, 94 FERC ¶ 61,038 (2001); *Arizona Public Service Co.*, 109 FERC ¶ 61,036 (2004)).
2. Part I of the FPA does not preempt every state and local law that might conceivably relate to the decommissioning and removal of Condit. PC's assertion that all state and local laws enacted for the protection of the Counties' citizens and resources have been swept aside by the FPA is directly contrary to the Supreme Court's holding in *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152, 167 (1946) ("*First Iowa*"), that the FPA "establishes a *dual* system of control." Further, PC's position on preemption is patently inconsistent with a recent

Commission decision wherein it held that a state law requiring state approval of the transfer of a Commission-licensed hydroelectric project was *not* preempted by Part I of the FPA (*North Hartland, LLC*, 101 FERC ¶ 61,157 (2002)).

3. A consistency determination made by the United States Forest Service ("USFS") under *another federal law* -- the Columbia River Gorge National Scenic Area Act ("Gorge Act") (Pub. L. No. 99-663) -- independently mandates that the Commission *require* PC to comply with state and local laws pertaining to the protection of scenic, cultural, natural, and recreational resources. The FPA *cannot* preempt the Gorge Act or the requirements imposed by the USFS thereunder. Further, the courts and the Commission have held that USFS determinations under such statutes must be followed by the Commission (*High Country Resources, et al. v. FERC*, 255 F.3d 741 (9th Cir. 2001) (*affirming* 87 FERC ¶ 61,123 (1999)); *Swanson Mining Corp. v. FERC*, 790 F.2d 96 (D.C. Cir. 1986); *China Flat Co.*, 27 FERC ¶ 61,024 (1984); *Wyeth Hydro Electric Corp.*, 43 FERC ¶ 61,291 (1988)).

DISCUSSION

I. The Commission Should Require PC To Honor Its Commitment To Obtain All "Local Permits"

PC filed its SA with the Commission on October 21, 1999. In its filing, PC requested that the Commission "approve the Settlement without modification or condition" (at pp. 5, 7). Section 2.2 of the SA provides, in pertinent part, as follows:

[PC] shall apply for and use its best reasonable efforts to obtain in a timely manner and in final form all applicable federal, state, regional, and local permits, licenses, authorizations, certifications, determinations, and other governmental approvals, including but not limited to the Amended License, necessary to commence Project removal in accordance with the Removal Plan and this Agreement ("Permits").

Thus, the SA that PC executed and asked the Commission to approve "without modification" specifically *requires* PC to obtain all "state, regional, and local" permits, authorizations, etc. associated with the removal. As noted previously, PC has repeatedly informed the Commission and the Counties that it would be filing applications with the Counties for associated permits required by state and local laws. Even the federal resource agencies that executed the SA have acknowledged the need to obtain "regional and local" authorizations. *See, e.g.*, the Joint Answer

and Reply to Comments filed in this proceeding on April 11, 2000, by the U.S. Department of the Interior and the National Marine Fisheries Service wherein they referenced (at p. 9) the need "for obtaining ... other authorizations" at "state, regional and local levels."

Six years after agreeing in writing to obtain all local permits PC, *without even mentioning in its Petition its written commitment in Section 2.2 of the SA to obtain such permits*, is now asking the Commission to summarily sweep aside the very state and local laws with which PC had agreed to comply and thus excuse PC from complying with its commitment. However, PC has not explained why it should be excused from this written commitment. Nor has it provided any reason why it should be rewarded for misleading the Commission and the Counties on this issue since 1999.

PC undoubtedly will attempt to justify its action by citing to Section 2.2's use of the modifier "applicable" before the reference to "local permits" and arguing that it was only agreeing to obtain "applicable" permits (*i.e.*, those permits that were not otherwise preempted by Part I of the FPA). However, PC's position in its Petition is that there are *no* "applicable" "local permits," since in its view all such permits are preempted. Given this PC position, its reference to "local permits" in Section 2.2 of the SA appears to have been a deliberate attempt by PC to mislead the Commission and the Counties into believing that PC would obtain such permits when it had no intention of ever doing so. Once again, such nefarious behavior should not be rewarded.

Requiring PC to honor its written commitment to obtain all local permits is also fully consistent with past Commission decisions in dam removal cases where the Commission has required licensees to obtain all state and local permits. For example, in *Wisconsin Electric Power Co.*, 94 FERC ¶ 61,038 at pp 61,180, 61,182 (2001), the Commission required a licensee

in Michigan proposing to dismantle its project and remove project facilities to obtain a *county soil erosion and sedimentation control permit*, along with a variety of permits from the Land and Water Management Division of a state agency pertaining to inland lakes and streams, water resources protection, and wetlands protection.¹ Similarly, in *Arizona Public Service Co.*, 109 FERC ¶61,036 at pp. 61,142, 61,149 (2004) ("*Arizona*"), the Commission, in approving a licensee's proposal to decommission and remove the Childs Irving Project, required the licensee to comply with a state condition to obtain "all other permits, certifications and licenses that may be required by federal, state or local authorities," including approvals pertaining to construction activities, use of reclaimed wastewater for dust control or irrigation, and dewatering of construction sites. PC, which liberally references a previous Commission order in the Childs Irving proceeding in support of its contention that all local permits are preempted (Petition at pp. 19-20), curiously ignores the *Arizona* order.

In short, the Commission as a matter of policy should require PC to obtain all permits required by the Counties, because: (1) PC committed in writing to do so six years ago; (2) PC has not demonstrated that it should be excused from this commitment; and (3) requiring PC to obtain such permits is fully consistent with established Commission practice and is necessary to avoid rewarding PC for misleading the Commission and the Counties.

II. Part I Of The FPA Does Not Preempt All State And Local Regulatory Authority Related To The Removal Of Condit

Citing to *First Iowa* and its progeny, PC contends that all state and local authorities the Counties might attempt to exercise with regard to any of PC's various activities associated with the decommissioning and removal of Condit are summarily preempted by Part I

¹ See also the letter filed in that proceeding on October 16, 2000, by the Michigan Department of Environmental Quality.

of the FPA. According to PC, these regulatory authorities "include, but are not limited to, county environmental ordinances, subdivision review, floodplain permits, zoning, shoreline permits, critical areas review, noise ordinances, and road permits." Petition at p. 1. *See also* Petition at pp. 11-12 and Exhibit B thereto, listing various reviews and permits the Counties have indicated likely would be applicable to PC's activities. PC contends that, given the Counties' past opposition to PC's "blow and go" approach, the Counties are unlikely to grant all of the permits or would grant them subject to conditions unacceptable to PC.

The Counties certainly appreciate PC's desire to avoid any law that might be inconvenient or unacceptable to PC. However, that the Commission might approve PC's proposal to decommission and remove Condit would not summarily result in the invalidation of every law enacted by the State of Washington and the Counties that might pertain to PC activities related to Condit. As the Court explained in *First Iowa*, Part I of the FPA "establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction." 328 U.S. at 167. Under PC's expansive reading of the preemptive sweep of Part I of the FPA, the laws and ordinances the state and the Counties have adopted to protect citizens from the dangers of blasting and demolition, to control noise pollution, to provide for safe and environmentally appropriate use of county roads, to ensure appropriate designation and use of areas for staging and debris disposal, to protect fish and wildlife, and to protect wetlands and other natural resources along shorelines and floodplains would simply cease to apply. In other words, under PC's theory, no state or local laws survive. Clearly, this expansive interpretation of preemption is contrary to the Court's conclusion that the FPA provides for a "dual system" of control.

PC has also misconstrued the Commission's own view on preemption. Contrary to PC's contentions, the Commission currently takes a *narrow* view of the preemptive effect of Part I of the FPA. For example, in *North Hartland, LLC*, 101 FERC ¶ 61,157 (2002), the proposed transferee of a license, after the Commission had already approved the transfer of the license to it contingent upon the conveyance of project properties to the transferee (*id.* at p. 61,643 and 91 FERC ¶ 62,227 (2000)), filed a petition for a declaratory order seeking a ruling that a provision of state law requiring state approval of the transfer of the project properties to the transferee was preempted by Part I of the FPA. Relying on *First Iowa* and the other cases cited by PC in its Petition, the transferee argued that the state approval interfered with the Commission's exclusive authority to approve license transfers under the FPA and therefore was preempted. The Commission disagreed and denied the petition. Despite the fact that the state's failure to approve the transfer of project properties to the transferee would prevent the Commission-approved transfer of the license from becoming effective, the Commission found that the state law and approval were *not* preempted. As the Commission explained (*id.* at p. 61,644):

Vermont Section 109 would be preempted if it purported to give the state the authority to authorize license transfers without Commission action, or to preclude the Commission from acting on a transfer application. But it does not do so. Rather, Section 109 establishes a means for the state to determine if a proposed sale or lease of public service assets will promote the general good of the state. The FPA does not preclude state review, or even veto, of the conveyance of project property.

The Commission's rationale in *North Hartland* is readily applicable here. The Counties are not attempting to assert the right to authorize (or not authorize) the decommissioning/removal of Condit. Nor are they attempting to preclude the Commission from acting on PC's proposal as to Condit. Rather, the Counties are merely attempting to protect their citizens and resources and

thus "promote the general good of the state." As in *North Hartland*, the FPA does not preclude these types of local activities.

Of course, and contrary to the implications of PC's Petition, compliance with state and local regulatory authorities in relation to licensed projects is not a novel concept. In addition to the dam removal cases discussed previously, the Commission's standard land-use license article specifically requires licensees to ensure that certain users of project lands and waters comply with "state and local health and safety requirements" and conditions other uses on the applicants' prior obtainment of "all necessary state and federal approvals."

Finally, the Counties emphasize that, irrespective of the Commission's determination on the FPA preemption issue, the Commission's approval of the decommissioning/removal of Condit could not in any way act as a shield to protect PC from any causes of action brought against PC by the Counties or its citizens for damages caused by PC's actions in relation to the removal of Condit, including damages that may be actionable under applicable Washington statutes and common law doctrines. See § 10(c) of the FPA, 16 U.S.C. § 803(c), which specifies that "licensees shall be liable for all damages occasioned to the property of others" by their projects, and *South Carolina Public Service Authority v. FERC*, 850 F.2d 788 (D.C. Cir. 1988) (discussing case law holding that § 10(c) preserves state law causes of action).

III. The Federal Gorge Act Mandates That The Commission Require PC To Comply With All State And Local Laws Relating To Protection Of Scenic, Cultural, Natural And Recreation Resources

In its zeal to have the Commission declare that Part I of the FPA has swept aside all state and local laws pertaining to PC's Condit removal activities, PC seems to have forgotten that *another federal law* -- which most assuredly is not in any way preempted by Part I of the FPA -- specifically mandates that the Commission require PC to comply with state and local laws pertaining to the protection of natural and other resources in the Counties.

Specifically, in 1986 Congress enacted the Gorge Act to establish a national scenic area so as to protect and provide for the enhancement of the scenic, cultural, recreational, and natural resources of the Columbia River Gorge. *See* 16 U.S.C. § 544, *et seq.* Pursuant to the Gorge Act, the Columbia River Gorge National Scenic Area ("Scenic Area") was created. 16 U.S.C. § 544b. The portion of the White Salmon River where Condit is located is included in the Scenic Area, as recognized by the Commission itself. *See* the June 2002 FSFEIS on Condit at § 2.10.4 (p. 25). As required by the Gorge Act (16 U.S.C. § 544d), the Columbia River Gorge Commission established pursuant to the Act (16 U.S.C. § 544c) has developed a Scenic Area Management Plan to provide for the protection of natural and other resources in the Scenic Area. Various portions of the Management Plan requires compliance with "all applicable federal, state, and local laws." Most significantly for this proceeding, § 14(d) of the Gorge Act (16 U.S.C. § 544l(d)) provides as follows:

Federal agencies having responsibilities within the scenic area shall exercise such responsibilities consistent with the provisions of [the Gorge Act] as determined by the Secretary [of Agriculture].

Federal activities are deemed consistent with the Gorge Act if they, *inter alia*, comply with the Management Plan. The Secretary of Agriculture has delegated his authority to make consistency determinations under § 14(d) to the USFS.

By letter dated August 30, 2002 (filed at the Commission on September 4, 2002²), the USFS -- another signatory of the SA -- transmitted its § 14(d) consistency determination with respect to the Commission's proposed action to approve PC's SA proposal to decommission and remove Condit (as analyzed in the June 2002 FSFEIS). The USFS concluded that the Commission's approval of the Condit SA proposal would be consistent with the Gorge Act and the Management Plan, "*provided the following conditions are met*" (emphasis added):

* * *

4. The Settlement Agreement proposal shall meet all federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreational resources.

USFS letter at p. 2. The USFS amplified on this requirement in its discussions of "Wetlands" and "Streams Ponds, Lakes and Riparian Areas" in the Consistency Determination attached to the letter. It stated as follows (at p. 11 (Wetlands); emphasis in original, bolding added):

- F. *The proposed use complies with all applicable federal, state, and local laws.*

Findings: The proposed use is either being designed to comply with federal, state and local laws **or will include mitigation conditions to do so**. Other federal, state and local permitting decisions will follow the FERC decision. To meet Guideline F above, a *condition* of this consistency determination is that the proposed Settlement Agreement project **must** comply with federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreation resources.

See also p. 15, item 6 F (Streams, Ponds, Lakes and Riparian Areas).³

² A copy of the USFS' August 30, 2002 letter is also appended hereto as Attachment A.

³ The fact that the USFS (another signatory to the SA) indicated in its Consistency Determination that "other federal, state and local permitting decisions will follow the FERC decision" is further proof that the parties to the SA thought that there was a need for PC to obtain "local" authorizations.

In other words, the USFS determined that, in order for the Commission to meet the requirement of § 14(d) of the Gorge Act to exercise its responsibilities as to PC's Condit removal proposal consistent with the Gorge Act, the Commission must either be assured that PC will comply with "federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreation resources" or include "mitigation conditions" in its approval requiring such compliance. Since PC has clearly indicated that it has no intention of complying with such laws, the Commission must condition any approval of PC's proposal on PC's compliance with such state and local laws.⁴ Since the Gorge Act, like the Clean Water Act, is a federal law, it and the state and local requirements made applicable through the condition imposed as part of the USFS § 14(d) Gorge Act Consistency Determination, cannot be preempted by the FPA.

The Commission, of course, must comply with the USFS Consistency Determination and its conditions. As both the Commission and the courts have explained in the context of a similar statutory scheme (the Wild and Scenic Rivers Act ("W&SRA")), these statutes vest the authority to make consistency determinations in the Secretary of Agriculture (USFS) (not in the Commission), the Commission is bound to follow them, and it is not the Commission's "role to judge the validity of another agency's delegation practices or decisionmaking" in these circumstances. See *High Country Resources*, 87 FERC ¶ 61,123 at p. 61,492 (1999) (order denying rehearing of the dismissal of license applications based on the USFS' determination that the projects were not consistent with the requirement of the W&SRA), *aff'd*, *High Country Resources, et al. v. FERC*, 255 F.3d 741 (9th Cir. 2001); *Swanson Mining Corp. v. FERC*, 790 F.2d 96, 104 (D.C. Cir. 1986); and *China Flat Co.*, 27 FERC ¶ 61,024

⁴ The USFS letter indicated (at p. 2) that "this final consistency determination may be appealed to the Regional Forester." Apparently, PC did not seek such an appeal.

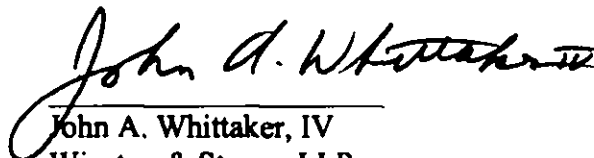
(1984). *See also Wyeth Hydro Electric Corp.*, 43 FERC ¶ 61,291 (1988), where the Commission denied an appeal of the denial of an application for license for a project that was found by the USFS to be inconsistent with another provision of the Gorge Act and held that it was bound by the USFS determination under the Gorge Act. Finally, the Counties note that the Commission in the FSFEIS itself noted the need to comply with the provisions of § 14(d) of the Gorge Act and recognized the authority of the USFS to make its consistency determination. *See* § 2.10.4 of the FSFEIS (at pp. 25-26). *See also* § 5.5.5 of the FSFEIS (at p. 197) (noting that the USFS had imposed conditions in making its consistency determination under the Gorge Act).

Virtually every one of the state and local review and permitting provisions referenced in the Petition (at pp. 11-12) and in Klickitat County's August 2, 2005 letter to PC attached thereto (Exhibit B) relate directly or indirectly to the protection of "scenic, cultural, natural and recreational resources" in the Scenic Area. Therefore, pursuant to the condition imposed by the USFS in its Consistency Determination, these provisions must be complied with by PC in order for the Commission to meet the requirements of § 14(d) of the Gorge Act. The most significant of these are the requirements that PC's proposal undergo the Counties' analysis and review pursuant to SEPA, the Counties' Critical Areas Ordinances, and subdivision provisions, and that PC obtain a Floodplain Permit, a Shoreline Substantial Development Permit, a Shoreline Conditional Use Permit, a Conditional Use Permit(s) under the Zoning Ordinances, and road permits.

CONCLUSION

For the foregoing reasons, the Counties respectfully request that the Commission deny PC's Petition and clarify that, if the Commission approves PC's Condit removal proposal, PC will have to comply with all state and local laws providing the Counties with the authority to review and issue permits related to such proposal.

Respectfully submitted,



John A. Whittaker, IV
Winston & Strawn LLP
1700 K Street, N.W.
Washington, D.C. 20006-3817
Tel: 202-282-5000
Fax: 202-282-5100
Email: jwhittaker@winston.com

ATTORNEY FOR THE COUNTIES

Dated: November 14, 2005

Attachment A



United States
Department of
Agriculture

Forest
Service

Columbia River Gorge
National Scenic Area
(541) 386-2333
Fax (541) 386-1916

982 Waco Avenue
Suite 200
Hood River, OR 97031

ORIGINAL

File Code: 2770, 2370

Date: August 30, 2002

Margie R. Salas, Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, D.C. 20426

FILED
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FEDERAL ENERGY
REGULATORY COMMISSION

RE: Condit Hydroelectric Project, FERC No. P-2342-011
FINAL SUPPLEMENTAL FINAL ENVIRONMENTAL IMPACT STATEMENT

Dear Ms. Salas:

The Forest Service has reviewed the Condit Project Final Supplemental Final Environmental Impact Statement (FSFEIS) for consistency with the Columbia River Gorge National Scenic Area Act (PL99-663) and the Scenic Area Management Plan. Enclosed please find the Consistency Determination and Findings of Fact.

Section 14 (d) of the Scenic Area Act directs that federal agencies shall exercise their responsibilities consistent with the Act. In this case, the Federal Energy Regulatory Commission (FERC) is making a decision regarding licensing of the Condit Project. Section 14 (d) requires the FERC decision to be consistent with the Scenic Area Act as determined by the Forest Service.

The Forest Service previously made a preliminary consistency determination for the 1995, 1996, and 2002 DEIS, FEIS, and DSFEIS issued by the FERC. Area Manager Arthur J. Carroll transmitted the determinations for the DEIS and the FEIS via March 1, 1996 and December 19, 1996 letters. Area Manager Daniel T. Harkenrider transmitted the determination for the DSFEIS via a March 18, 2002 letter.

The determination for the DSFEIS included 10 conditions considered necessary by the Forest Service for the various alternatives to be consistent with the Scenic Area Act. Except for a portion of condition number 9, all 10 of the conditions have been incorporated into the FSFEIS. Condition number 9 stated:

Trapping and removal of anadromous and nonanadromous fish from Northwestern Lake within the Scenic Area and the White Salmon River below the dam shall take place prior to dam removal and sediment flushing.

The trapping and removal of anadromous fish prior to dam removal and sediment flushing was added to the FSFEIS. However, the trapping and removal of nonanadromous fish from Northwestern Lake within the Scenic Area was not added to the FSFEIS. The Forest Service



Magalie R. Salas

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concur with the reasoning given in the FSFEIS as to why the trapping and removal of nonanadromous fish from Northwestern Lake within the Scenic Area was not included. Therefore, the Forest Service is no longer recommending the trapping and removal of nonanadromous fish from Northwestern Lake within the Scenic Area prior to dam removal and sediment flushing.

This consistency determination addresses the FSFEIS dealing with the Settlement Agreement (SA) proposal. This review supplements the March 1, 1996, December 19, 1996, and March 19, 2002 Forest Service determinations.

Our review evaluated the SA proposal relative to the policies and guidelines of the Management Plan for the Columbia River Gorge National Scenic Area. The Management Plan was previously submitted to the FERC; page 5-20 of the FEIS (Oct. 1996) and Section 5.5 of the FSFEIS reference the Plan.

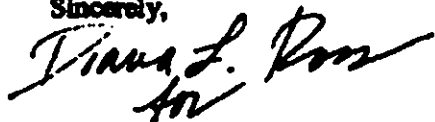
Based on the Findings of Fact, the FERC FSFEIS for the Condit Project Settlement Agreement proposal is consistent with the Scenic Area Act and Management Plan provided the following conditions are met:

1. All actions related to the Condit Project proceed as described in the FSFEIS.
2. The Cultural Resource Management Plan shall include measures for protecting cultural resources discovered during construction or facility removal activities, per SHPO and Scenic Area guidelines.
3. PacificCorp shall continue consultation with Washington Department of Fish and Wildlife to minimize Settlement Agreement proposal impacts to fish and wildlife habitat.
4. The Settlement Agreement proposal shall meet all federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreational resources.

This final consistency determination may be appealed to the Regional Forester.

The Forest Service has also addressed the Condit Project FSFEIS relative to the Lower White Salmon Wild and Scenic River. The Regional Forester has provided a Wild and Scenic River Act Section 7(a) and 7(b) determination in a separate letter.

Sincerely,



KIM M. TITUS
Acting Area Manager, CRGNSA

Enclosures: Forest Service Consistency Determination, Findings of Fact

Cc Columbia River Gorge Commission

CONDIT HYDROELECTRIC PROJECT

Consistency Determination: Columbia River Gorge National Scenic Area

USDA Forest Service, 902 Wasco Ave., Hood River, OR 97031

Agency: Federal Energy Regulatory Commission

Proposed Action: Relicensing of Condit Hydroelectric Project
(FERC Project No. P-2342-011)

Final Supplemental Final Environmental Impact Statement
June 2002

Location: Klickitat, Skamania Counties, Washington, Sections 3, 10, 11, 14,
15 T2N, R10E, W. M. Condit Project is on the White Salmon
River.

**Scenic Area
Designation:** General Management Area (GMA)

**Land Use
Designation:** Open Space and Lakes, Tributaries and Columbia River

BACKGROUND:

Project Proposal

The Federal Energy Regulatory Commission (FERC) is considering a relicensing proposal for the Condit Hydroelectric Project (Condit). PacifiCorp owns Condit and filed an application on October 29, 1999 to amend the current license to extend the license term to October 2006 and incorporate the terms and conditions of a Settlement Agreement (SA) that provides for removal of the dam. The FERC published a June 2002 Final Supplemental Final Environmental Impact Statement (PSFEIS) responding to the dam removal proposal. The PSFEIS supplements the October 1996 Final Environmental Impact Statement (FEIS) and the January 2002 Draft Supplemental Final Environmental Impact Statement (DSFEIS).

The proposed Settlement Agreement would remove Condit by creating a 12' x 18' hole in the dam, resulting in Northwestern Lake draining within 6 hours. The flushing action would transport 1.56 million cubic yards of material downstream. The dam, pipe, surge tank and penstock would be removed. The White Salmon River reach now inundated by Northwestern Lake would change back to a river. Up to 670,000 cubic yards of sediment would be deposited at the mouth of the White Salmon River over a 5-15 day period. Dam and other solid waste material would be disposed of outside the Scenic Area.

Documents

The following list of documents describes the project and provides analysis of project impacts and proposed mitigations. These documents were used for the Scenic Area consistency determination findings.

- Final Report Condit Hydroelectric Project, Wildlife Habitat and Mapping Study, Ebasco Environmental, December 1990 (wildlife, rare plants, wetlands).
- Condit Hydroelectric Project, Draft Environmental Impact Statement, FERC November 1995.
- Forest Service Area Manager Arthur J. Carroll Scenic Area consistency determination and letter to FERC, March 1, 1996.
- Potential Effects of Reintroducing Anadromous Fish on Resident Rainbow Trout in the Lower White Salmon Wild and Scenic River, Robert H. Deibel, Forest Service, November 20, 1995.
- Condit Hydroelectric Project, Final Environmental Impact Statement, FERC October 1996.
- Forest Service Regional Forester Robert W. Williams Wild & Scenic River consistency determination and letter to FERC December 18, 1996.
- WDFW biologist Mary Linders letters to David Anderson on Western pond turtle surveys May 1996, July 1997.
- Condit Hydroelectric Project Removal PacifiCorp, RW Beck, May 1998
- Summary of Information Relating to Sediment During Dam Removal-White Salmon River, DR Guthard & Associates, February 1998.
- Condit Hydroelectric Project, Project Removal Study, Independent Review, Black & Veatch, November 20, 1998
- Condit Hydroelectric Project Settlement Agreement, PacifiCorp, et al, September 22, 1999.
- Response to November 20, 1998 Additional Information Request (from FERC), PacifiCorp, Terry Flores, January 26, 2001.
- Revised Draft Cultural Resource Management Plan, Condit Hydroelectric Project, PacifiCorp, EDAW, January 25, 2001.
- Response to FERC June 21, 2001 letter, PacifiCorp, Robert A. Nelson, August 6, 2001.
- Draft Supplemental Final Environmental Impact Statement, Condit Hydroelectric Project, FERC, January 2002.
- Draft Biological Assessment of Listed, Proposed, and Candidate Species As Related to the PacifiCorp's Condit Hydroelectric Project, PacifiCorp (Shirier, Garrett), February 6, 2002.
- Final Supplemental Final Environmental Impact Statement, Condit Hydroelectric Project, FERC, June 2002

Scenic Area Consistency Review Process

The Forest Service did a Scenic Area consistency review of the FERC November 1995 Draft Environmental Impact Statement and the October 1996 Final Environmental Impact Statement. Those documents included alternatives of dam removal and fish passage, however the method of dam removal and sediment disposition has changed with the Settlement Agreement proposal. Other changes from earlier alternatives include no provision of new recreation facilities in the Scenic Area. In letters of March 1, 1996 and December 19, 1996, Area Manager Arthur J.

Carroll provided consistency determination comments to the FERC. In a letter dated March 18, 2002, Area Manager Daniel T. Harkenrider provided consistency determination comments to FERC on the DSFEIS, which addressed the above-mentioned changes due to the Settlement Agreement proposal. This current consistency review of the Settlement Agreement proposal supplements the previous Forest Service consistency reviews.

The Scenic Area consistency review assesses the Settlement Agreement proposal relative to the Columbia River Gorge Management Plan (Plan), Columbia River Gorge Commission, September 1992. Plan guidelines are the basic criteria used to evaluate elements of the proposal. Guidelines cover land use designation, scenic, cultural, natural and recreation resources and Tribal treaty rights. Certain Plan goals and policies are also addressed. An explanation of why there are no findings for the economy is provided. The review will assess differences in the current Settlement Agreement proposal from the earlier alternatives. The primary difference from a previous dam removal alternative is the method of dam removal and sediment disposal. The Findings of Fact document is organized as follows:

- Land Use Designation
- Scenic Resources
- Cultural Resources
- Natural Resources
 - Wetlands
 - Streams, Ponds, Lakes and Riparian Areas
 - Wildlife Habitat
 - Rare Plants
- Recreation Resources
- Treaty Rights
- Economy
- Relationship to Laws and Policies

SCENIC AREA CONDITIONS OF CONSISTENCY:

Based on the Findings of Fact, the Federal Energy Regulatory Commission FSFEIS for the Condit Project Settlement Agreement proposal is consistent with the Columbia River Gorge National Scenic Area Act and Management Plan provided the following conditions are met.

1. All actions related to the Condit Project proceed as described in the FSFEIS.
2. The Cultural Resource Management Plan shall include measures for protecting cultural resources discovered during construction or facility removal activities, per SHPO and Scenic Area guidelines.
3. PacifiCorp shall continue consultation with Washington Department of Fish and Wildlife to minimize Settlement Agreement proposal impacts to fish and wildlife habitat.
4. The Settlement Agreement proposal shall meet all federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreation resources.


KIM M. TITUS
Acting Area Manager

08/30/02
Date

FINDINGS OF FACT:

Land Use Designation

Findings: Since dam removal was included in 1995-1996 alternatives, relative to land use designation guidelines dealing with basic land uses, there is no change from the March 1, 1996 consistency review findings. The March 1, 1996 consistency determination found all alternatives, including dam removal, not in conflict with Plan land use designation guidelines. The basic land use of dam removal as an anadromous fisheries enhancement project involves federal, state and tribal resource agencies. However, because a different method of dam removal is now proposed, resource protection guidelines must be assessed as follows.

Scenic Resources

Changes to the landscape due to the Settlement Agreement proposal include removal of the dam, pipes, penstock and surge tank, change of Northwestern Lake to a river, deposition of sediment in downstream White Salmon River pools and at the river's mouth, bare slopes in the area around the dam and where the Lake was and turbidity of the White Salmon and Columbia Rivers. The proposal does include various mitigation measures to deal with resource impacts.

1). Management Plan, Overall Scenic Provisions, GMA Guidelines 5, page I-5 states:

For all proposed development, the determination of compatibility with the landscape setting shall be based on information submitted in the site plan.

Finding: The RW Beck May 1998 report includes site plans, other plans and information sufficient to make a scenic resource consistency determination.

2). Management Plan, Key Viewing Areas, GMA Guidelines 1, page I-8 states:

Size, height, shape, color, reflectivity, landscaping, siting or other aspects of proposed development shall be evaluated to ensure that such development is visually subordinate to its setting as seen from key viewing areas.

Finding: Key viewing areas in the project area are State Routes (SR) 14 and 141 and Cook Underwood Road. Changes to the White Salmon River's mouth and lower reaches would be visible from SR 14 and 141 and Cook Underwood Road. The lower White Salmon River is visible from Highway 141 for about 3000' from the junction of SR 14; roadside trees filter that view from Highway 141. There is also one filtered view of the White Salmon River from Highway 141 approximately 7000' north of the highway's junction with SR 14; the river is 1500' distant in that view. The White Salmon River mouth is visible from Cook Underwood Road at its junction with SR 14; there are also filtered views of the lower river reach in a .5 mile section of Cook Underwood Road as the road traverses the lower river canyon. Condit dam and Northwestern Lake are not visible from either SR 14 or 141.

Landscape changes visible from key viewing areas include White Salmon River and Columbia River turbidity, deposition of silt, sand and gravel in pools along the lower White Salmon River and at its mouth and change of the lower White Salmon River mouth from a flat-water linear lake to a river delta.

Water turbidity with resultant discoloration will be highest within the first 2 weeks of Northwestern Lake drainage. Water discoloration would return to normal within one year. Discoloration would be short term, but would meet visual subordination within the Management Plan required two-year period.

Sedimentation in the White Salmon River lower .8 mile reach would cause a change from a flat-water narrow lake to a river channel with a delta at the mouth. Depending on Columbia River pool elevation, the delta sands and gravels would be either covered with shallow water or be visible. The White Salmon River would create a channel through the sediment. The appearance of the mouth delta would be similar to the mouths of the Klickitat River or Hood River as they enter the Columbia River.

The color of sediment would be various shades of gray and brown. The form of the sediment would initially be a change at the river mouth area but would be deposited by hydrologic forces and be similar in form, line and texture to sediment bars at other river mouths such as the Hood or Klickitat Rivers. The color, form, line and texture of the sedimentation materials at the mouth would have a natural appearance within approximately 2 years; after initial changes the delta would not noticeably contrast with the setting.

The Plan Glossary definition of visual subordination relates to structures. Whether or not the delta meets the definition of a structure per Plan Glossary, the resulting delta would be similar in appearance to the mouths of other rivers directly entering the Columbia River. The proposal would meet visual subordination.

Sedimentation in the pools along the White Salmon River would be similar to the results of flood events along other rivers in the area. Pool sedimentation would have a natural appearance within a short-term period; color, form, texture and line would be similar to sedimentation in other free-flowing river areas. Most of the pools below Condit Dam are not visible from Highway 141 until about 3000 feet upstream of the river mouth. Pool sedimentation would meet visual subordination.

3). Management Plan, Key Viewing Areas, GMA Guidelines 2, page 1-8 states:

The extent and type of conditions applied to proposed development to achieve visual subordination should be proportionate to its potential visual impacts as seen from key viewing areas. Primary factors influencing the degree of potential visual impact include: the amount of area of the building site exposed to key viewing areas,...

Findings: This guideline deals with proposed building sites. As the Settlement Agreement proposal does not include new building sites, this guideline is not applicable.

4). Management Plan, Key Viewing Areas, GMA Guidelines 3, page 1-8 states:

Determination of potential visual effects and compliance with visual subordination policies shall include consideration of the cumulative effects of proposed developments.

Findings: The proposal does not include development per the Plan Glossary definition. However, the proposed action of flushing sediment will result in cumulative effects of turbidity and sedimentation. These cumulative effects will be short-term but will result in long-term landscape changes. The long-term changes have been addressed in point 2 above.

5). Management Plan, Key Viewing Areas, GMA Guidelines 26, page 1-14 states:

Compliance with specific approval conditions to achieve visual subordination ...shall occur with a period not to exceed 2 years after development approval....

Findings: This guideline provides intent for the time period for mitigation measures to be effective. The measure used in the proposal for dealing with scenic impacts of turbidity and sedimentation is flushing the material through the river systems in a very short period of time. Within the 2-year period, turbidity would return to normal for free-flowing rivers. The basic changes due to sedimentation at the mouth and within river pools would occur in several days after flushing and have an appearance of a delta within the 2-year time period.

6). Management Plan, Landscape Settings, GMA Policies 1, page 1-14 states:

New developments shall be compatible with their landscape setting and maintain the integrity of that setting. ...

Findings: Condit project area is in the Gorge Walls, Canyons, and Wildlands Landscape Setting. Per the Management Plan, Gorge Walls, Canyons, and Wildlands represent some of the most natural settings of the Gorge despite proximity to major thoroughfares as SR 14 and 141. The Settlement Agreement would retain the overall landscape setting integrity by retaining natural vegetation along the White Salmon River corridor. Removal of the dam, penstock, wood pipe and surge tank and revegetation of areas around the removed dam would over time restore the area to a more natural appearing landscape in keeping with the downstream natural landscape setting.

7). Management Plan, Scenic Travel Corridors, GMA Guideline 2, page I-36 states:

All new buildings and alterations to existing buildings shall be set back at least 100 feet from the edge of pavement of the scenic travel corridor roadway....

Findings: Scenic Travel Corridors Guidelines deal with new buildings and alterations to existing buildings. The Settlement Agreement proposal will remove the surge tank building, it is approximately .5 mile from SR 141.

Cultural Resources

Response to Forest Service 1996 Consistency Condition

1). Properties eligible for listing on the National Register of Historic Places includes the dam and intake, wood stave pipe, penstocks, surge tank and power house. The Forest Service March 1, 1996 Area Manager consistency determination included a condition for protecting cultural resources per the alternatives including dam removal. Condition # 3 per the Dam Removal alternative identified the need for a professional assessment of affects on historic properties, development of mitigation plan and consultation with the Washington Office of Archeology and Historic Preservation (OAHP). These current findings will assess subsequent PacifiCorp actions and responses to that condition.

PacifiCorp has filed a revised Draft Cultural Resource Management Plan (CRMP) with the FERC and the Washington Office of State Office of Archeology and Historic Preservation (OAHP). The Plan includes a description of historic, archeological and traditional cultural properties and provides mitigation measures for dam and other historic property removal. The FERC staff had previously recommended a Level 1 Historic American Building Survey and Historic American Engineering Record (HABS/HAER) recordation including drawings, photographs and written data.

A Programmatic Agreement between the FERC, OAHP, Advisory Council on Historic Preservation and PacifiCorp was executed May 1997 to implement the CRMP. PacifiCorp through the Yakama Nation has undertaken additional archeological inventories of the 3.3 mile river area downstream of the dam.

The FERC staff in the January 2002 DSFEIS has concurred with the OAHP that a Level 2 HABS/HAER recordation is sufficient for mitigating the removal of National Register eligible Condit Project facilities. If the project complies with OAHP requirements, OAHP would find there would be no adverse affects to cultural resources.

Findings: The additional archeological surveys, the revised Draft Cultural Resource Management Plan, Programmatic Agreement and the planned Level 2 HABS/HAER recordation will adequately mitigate adverse affects of removal of National Register facilities, protect

cultural resources and meet the conditions of the March 1, 1996 consistency determination. Through the various mitigation plans, there would be no adverse effect on cultural resources.

2). The March 1, 1996 consistency review had a condition dealing with discovery of cultural resources during construction activities.

Management Plan, Cultural Resources, GMA Guidelines, Cultural Resources Discovered After Construction Begins 1, page I-66 states:

The following procedures shall be effected when cultural resources are discovered during construction activities. All survey and evaluation reports and mitigation plans shall be submitted to the local government and the SHIPO. Indian tribal governments also shall receive a copy of all reports and plans if the cultural resources are prehistoric or otherwise associated with Native Americans. (A-B)

Findings: The CRMP by PacifiCorp consultant does not address discovery of cultural resources during construction activities. A condition of consistency needs to address the above Guideline. The condition shall address halting construction, notification and inventory and evaluation of the discovered cultural resources.

Additional Findings

3). Management Plan, Cultural Resources, GMA Guidelines pages I-56 to I-69.

Findings: The GMA Cultural Resource Guidelines address processes and procedures directed at local governments implementing local land use ordinances. The Forest Service in doing its consistency review is not a local government implementing local ordinances. Furthermore, unlike a local government, the Forest Service cannot regulate land uses or make decisions to prohibit land uses as directed by Plan Guidelines; the Forest Service is rather providing a consistency determination to the FERC. However, the Settlement Agreement proposal and the FERC's DSFEIS has substantially met the intent of the GMA Guidelines by means of various studies and processes undertaken by PacifiCorp including: in-depth surveys and analyses of historic and archeological properties, reports, evaluations, assessments, plans that mitigate and address adverse effects (Cultural Resource Management Plan) and consultation with OAHF and the Advisory Council on Historic Preservation (Programmatic Agreement).

4). Management Plan, Cultural Resources, GMA Goal 2, page I-50 states:

Ensure that proposed uses do not have an adverse effect on significant cultural resources.

Findings: Management Plan Goals are broad statements of policy that provide general direction. Goals are implemented by specific Plan Policies and Guidelines. Findings of facts do not include evaluations of goals.

5). Management Plan, Cultural Resources, GMA Guidelines, Mitigation Plan Criteria and Information Needs 1, page I-65 states:

Mitigation plans shall be prepared when proposed uses would have an adverse effect on significant cultural resources. The plans shall reduce an adverse effect to no effect or no adverse effect. Mitigation plans shall meet the following: (A-C(5))

Findings: Mitigation plans, including documentation, consultation, and mitigation for discovery during construction, as required by Plan Guidelines either have been prepared by PacifiCorp or will be prior to adverse effects on significant cultural resources.

Natural Resources

Wetlands

Within the Scenic Area, wetlands are located on the west shoreline of Northwestern Lake (approximately .1 acre), and in the river area below the dam at several sites, (less than .1 acre up to .4 acre). The wetlands on Northwestern Lake are a very narrow shoreline band on steep slopes with shallow soils and only exist due to waters backed up behind the dam. Northwestern Lake wetlands within the Scenic Area would be replaced by riverine wetlands with assistance through revegetation by PacifiCorp.

1). Management Plan, Wetlands, GMA Policies 2, page I-85 states:

All wetlands, regardless of size or functions, warrant protection from new uses that may alter or destroy wetlands functions.

Findings: Scouring immediately following breaching of the dam will temporarily impact wetland sites below the dam. These sites would recover within 2-3 years; scouring is not anticipated to have long-term adverse effects. River shoreline wetlands and riparian areas would replace wetlands upstream of the dam through PacifiCorp's revegetation. This Policy is implemented by meeting Wetlands Guidelines, Review Uses 2.

2). Management Plan, Wetlands, GMA Guidelines Review Uses 2, page I-88 states:

Except uses allowed outright and review uses in guidelines 1A through 1C, above, proposed uses may be allowed in wetlands and wetland buffer zones, subject to compliance with guidelines for the protection of scenic, natural, cultural, and recreation resources and "Approval Criteria for Other Review Uses in Wetlands" in this section.

Approval Criteria for Other Review Uses in Wetlands

A. The proposed use is water-dependent, or is not water-dependent but has no practicable alternative as determined by the practicable alternative test in this section.

Findings: The proposed Settlement Agreement would remove the existing dam structure and flush sediment downstream. The concept of water-dependency is not applicable to facility removal because water-dependency applies to new proposed projects and whether or not that new use is water-dependent. However, alternatives have been analyzed in 3 FERC documents: 1995 DEIS, 1996 FEIS and the current January 2002 DSFEIS. These Environmental Impact Statements (EIS) and the studies by PacifiCorp and their consultants have met the practicable alternative test.

3).

B. The proposed use is in the public interest as determined by the public interest test in this section.

Findings: This guideline has been met by the various public FERC EIS documents (1995, 1996, 2002) and PacifiCorp studies, documents and plans listed under the Documents section of this consistency determination.

4).

C. Measures will be applied to ensure that the proposed use results in the minimum feasible alteration or destruction of the wetland's functions, existing contour, vegetation, fish and wildlife resources, and hydrology.

Findings: The proposal with mitigation measures by PacifiCorp, FERC and other agency conditions would meet this guideline. The impact of sediment flushing on wetlands downstream of the dam will be short-term, as the wetlands would recover. The lake shoreline wetlands would be replaced by riverine wetlands and riparian vegetation.

5).

D. Groundwater and surface-water quality will not be degraded by the proposed use.

Findings: There will be short-term water quality impacts. After initial flushing of sedimentation, water quality will gradually improve over a 1 year period to near normal conditions for a free-flowing river. There would be minimal long-term adverse affects; adverse affects to water quality would not be more than moderate. Consequently surface water would not have long-term degradation. A concern has been expressed for ground-water table affects on wells outside of the Scenic Area; the DSFEIS recommendations by the FERC staff address ground water affects on those wells. Ground water within the Scenic Area would not be affected nor would it be degraded.

6).

E. Those portions of a proposed use that are not water-dependent or that have a practicable alternative will not be located in wetlands or wetlands buffer zones.

Findings: This guideline is not applicable to removal of an existing dam. As explained under Guideline A. above, alternatives to the proposed action have been examined.

7).

F. The proposed use complies with all applicable federal, state, and local laws.

Findings: The proposed use is either being designed to comply with federal, state and local laws or will include mitigation conditions to do so. Other federal, state and local permitting decisions will follow the FERC decision. To meet Guideline F. above, a condition of this consistency determination is that the proposed Settlement Agreement project must comply with federal, state and local laws relating to protection of Scenic Area scenic, cultural, natural and recreation resources.

8).

G. Areas that are disturbed during construction of the proposed use will be rehabilitated to the maximum extent practicable.

Findings: The Settlement Agreement proposal includes rehabilitation by revegetation of exposed slopes and reshaping of sediment areas above the dam. PacifiCorp has developed a revegetation plan that meets this Guideline.

9).

II. Unavoidable impacts to wetlands will be offset through the deliberate restoration, creation, or enhancement of wetlands. Wetlands restoration, creation, and enhancement are not alternatives to the guidelines listed above; they shall be used only as a last resort to offset unavoidable wetlands impacts.

Findings: The PacifiCorp revegetation plan will include wetland and riparian habitat restoration that will offset wetlands impacts.

10).

H. (1) Impacts to wetlands shall be offset by restoring or creating new wetlands or by enhancing degraded wetlands. Wetland restoration shall be the preferred alternative.

Findings: The PacifiCorp revegetation plan will include wetland restoration and creation to offset wetlands impacts.

11).

H. (4) The size of replacement wetlands shall equal or exceed the following ratios.
Creation: 3:1

Findings: Sections 4.9.4.1 and 4.10.4 of the FSFEIS include new mitigation measures that discuss the need for PacifiCorp to complete a final revegetation plan, which addresses the need to replace the approximate .1-acre wetland upstream of the dam with a minimum .3-acre wetland along the river. As long as the recommendations of the FSFEIS are followed, the above-mentioned criteria will be satisfied.

12).

H. (5) Replacement wetlands shall replicate the functions of the wetlands that will be altered or destroyed such that no net loss of wetlands functions occurs.

Findings: The revegetation plan includes wetland habitat development along the restored river such that no net loss of wetlands would occur. There would be change from lake to river wetlands.

13).

H. (7) Wetlands restoration, creation, or enhancement should occur within 1000' of the affected wetland. If this guideline is not practicable because of physical or technical constraints, replacement shall occur within the same watershed and as close to the altered or destroyed wetland as practicable.

Findings: Sections 4.9.4.1 and 4.10.4 of the FSFEIS include new mitigation measures that discuss the need for PacifiCorp to complete a final revegetation plan, which addresses the need for wetlands restoration, creation, or enhancement to occur within 1000' of the affected wetland, or as close as practicable. As long as the recommendations of the FSFEIS are followed, the above-mentioned criteria will be satisfied.

14).

H. (9) Five years after a wetland is restored, created or enhanced, at least 75 percent of the replacement vegetation must survive. The project applicant shall monitor the hydrology and vegetation of the replacement wetland and shall take corrective measures to ensure that it conforms with the approved wetlands compensation plan and this guideline.

Findings: The revegetation plan includes monitoring of wetlands results.

15). Management Plan, Wetlands, GMA Guidelines, Wetlands Compensation Plans, page 1-94 states:

1. *Wetlands compensation plans shall be prepared when a project applicant is required to restore, create, or enhance wetlands. They shall satisfy the following guidelines: (A-D are included)*

Findings: PacifiCorp has provided a summary of the revegetation plan to be done (Terry Flores January 26, 2001 document). Completion of the revegetation plan needs to be a condition of consistency.

16).

1. *E. A 5-year monitoring, maintenance, and replacement program shall be included in all plans. At a minimum, a project applicant shall provide an annual report that documents milestones, successes, problems and contingency actions.*

Findings: PacifiCorp's revegetation plan includes a monitoring plan in consultation with local resource agencies.

Streams, Ponds, Lakes and Riparian Areas

1). Management Plan, Streams, Ponds, Lakes and Riparian Areas, GMA Guidelines, Review Usage 2, page I-98 states:

Except uses allowed outright and review uses in guidelines 1A through 1C, above, proposed uses may be allowed in streams, ponds, lakes and riparian areas, subject to compliance with guidelines for the protection of scenic, natural, cultural, and recreation resources and "Approval Criteria for Other Review Uses in Aquatic and Riparian Areas" in this section.

Approval Criteria for Other Review Uses in Aquatic and Riparian Areas

A. The proposed use is water-dependent, or is not water-dependent but has no practicable alternative. A local government may conclude that a practicable alternative to the proposed use does not exist if the "Practicable Alternative Test" in the "Wetlands" section of this chapter is satisfied, substituting the term "stream, pond, lake, or riparian area" as appropriate.

Findings: In this case the Forest Service is doing the FERC decision consistency determination instead of a local government. The Settlement Agreement proposal would remove the dam and related facilities. The concept of water-dependency from the guideline is not applicable to facility removal because water-dependency applies to new proposed projects and whether or not that new use is water-dependent. Nevertheless, alternatives have been analyzed in 4 FERC documents: 1995 DEIS, 1996 FEIS, January 2002 DSFEIS and the current June FSFEIS. These Environmental Impact Statements and the studies by PacifiCorp and their consultants have met the practicable alternative test.

2).

B. The proposed use is in the public interest.

Findings: This guideline has been met by the various public FERC EIS documents (1995, 1996, 2002) and PacifiCorp studies, documents and plans listed under the Documents section of this consistency determination.

3).

C. Measures have been applied to ensure that the proposed use results in minimum feasible impacts to water quality, natural drainage, and fish and wildlife habitat of the affected stream, pond, lake, and/or buffer zone.

Findings: *Water quality:* Dam removal will result in sediment behind the dam flushing downstream in the White Salmon River. Sediment flushing will cause short-term high levels of turbidity, suspended sediment and reduced dissolved oxygen. Impacts to water quality would be

highest during the first year after dam removal. Most of the sediment is predicted to be sand, with primary deposition in the area of the White Salmon River mouth. A plume of sediment will result in the Columbia River that would be similar to the mouths of the Klickitat and Hood Rivers. Water quality will gradually improve over a 1-year period to near normal conditions for a free-flowing river. There would be minimal long-term effects; adverse effects would not be more than moderate. Measures such as sediment flushing in a short time period have been applied to ensure that there would be minimum impacts to water quality.

Natural drainage: The Settlement Agreement proposal includes dam and related facility removal; a blockage to natural drainage. Natural drainage patterns that existed prior to 1913 dam construction will be restored.

Fish and wildlife habitat: The fish and wildlife habitat of Northwestern Lake will change from a lake to a riverine habitat. Sediment flushing will cause high turbidity and suspended sediment levels in the White Salmon River below the dam for a 5-6 week period. Turbidity and suspended sediments would return to normal for a free-flowing river after a one to two year period. Lower reach pools would fill with sediment, but most sediment will be transported to the mouth. Deposited material would clear up over time as finer sediments will move through the river system and leave larger gravels and sand. Fish and wildlife habitat would have low long term impacts. There would be a loss or displacement of resident and anadromous fish in the White Salmon River below the dam and resident fish in the reservoir from sediment flushing. Draining of Northwestern Lake would be done during October to minimize impacts to year 2006 spawning populations. The flushing would be done over a very short time period with resultant short-term impacts.

According to U. S. Fish and Wildlife Service (Ging January 21, 1998 letter), impacts to anadromous fish from sediment flushing would be limited to a single year class. Mitigation would include trapping and removal of anadromous fish with a fish weir at the area of the fish rearing ponds in the lower White Salmon River prior to dam removal operations. The removed anadromous fish would be held to spawn in captivity with offspring returned to the river in spring of 2007. Nonanadromous and anadromous fish would repopulate the White Salmon River. Pools and runs upstream of the powerhouse tailrace and dam for anadromous fish would replace the loss of the thermal refuge benefits of the existing pool at the mouth of the White Salmon River. Invertebrate prey species for nonanadromous fish would repopulate the lower river by means of natural drift mechanisms.

An enhancement of the Settlement Agreement proposal is that anadromous fish habitat would be improved with dam removal and restoration of the free-flowing river. Anadromous fish would repopulate the restored river in the area of the dam and upstream within the Scenic Area. With dam removal, large woody debris would return to the river; the woody debris would provide fish habitat. Steelhead reintroduction would have some impact on resident trout within the Scenic Area. However, resident trout will persist. Resident trout within the restored river area at and above the dam (500 feet within the Scenic Area) would likely be smaller size fish than currently exist in that area.

In summary, with measures of short time period for flushing sediments and fish trapping, the Settlement Agreement proposal would have minimum feasible impacts to fish habitat. PacifiCorp is addressing the effects of the Settlement Agreement proposal on Endangered Species Act (ESA) listed species through its consultation process with National Marine Fisheries Service and U. S. Fish and Wildlife Service.

4).

C. (1) Construction shall occur during periods when fish and wildlife are least sensitive to disturbance....In Washington, the Washington Department of Wildlife and Washington Department of Fisheries shall evaluate proposals and specify periods for inwater work.

Findings: The Settlement Agreement proposal has been timed to have the minimum impact over the shortest period of time to fish and wildlife. Dam removal blasting would have minimal wildlife impact, as it will not be undertaken during nesting periods for sensitive wildlife. While discussions have occurred between PacifiCorp and the WDFW, a condition of consistency is that consultations continue during project planning and implementation to minimize impacts to fish and wildlife habitat.

5).

D. Groundwater and surface water quality will not be degraded by the proposed use.

Findings: Same as Wetlands 5) D.

6).

F. The proposed use complies with all applicable federal, state, and local laws.

Findings: Same as Wetlands 7) F.

7).

G. Unavoidable impacts to aquatic and riparian areas will be offset through rehabilitation and enhancement.

(2) Natural hydrologic conditions shall be replicated, including current patterns, circulation, velocity, volume, and normal water fluctuation.

(3) Natural stream channel and shoreline dimensions shall be replicated, including depth, width, length, cross-sectional profile, and gradient.

(5) Riparian areas shall be rehabilitated to their original configuration, including slope and contour.

Findings: The Settlement Agreement proposal includes restoring the White Salmon River to its original channel as a free-flowing river. Revegetation and restoration of a riverine environment and habitat over time is a planned part of the project.

8). Management Plan, Streams, Ponds, Lakes and Riparian Areas, GMA Guidelines, Stream, Pond, and Lake Buffer Zones 2, page I-102 states:

Except as otherwise allowed, buffer zones shall be retained in their natural condition. When a buffer zone is disturbed by a new use, it shall be replanted with native plant species.

Findings: Settlement Agreement proposed dam and facility removal will enter the stream buffer zone, but will over time restore the stream to a free-flowing riverine environment. PacifiCorp revegetation plans include replanting with native plant species.

9). Management Plan, Streams, Ponds, Lakes and Riparian Areas, GMA Guidelines, Rehabilitation and Enhancement Plans 1, page I-102 states:

Rehabilitation and enhancement plans shall be prepared when a project applicant is required to rehabilitate or enhance a stream, pond, lake, and/or buffer zone. They shall satisfy the following guidelines: A-E

Findings: PacifiCorp has prepared a revegetation plan that will rehabilitate the area around the dam and Northwestern Lake within the Scenic Area to a riverine environment. Areas downstream of the dam will rehabilitate naturally over time similarly as a free-flowing river rehabilitates its riparian zone after a major flood. Sections 4.9.4.1 and 4.10.4 of the FSFEIS include new mitigation measures that discuss the need for PacifiCorp to complete a final revegetation plan, which addresses the implementation of a 3-year monitoring period after planting and rehabilitation is initially completed. As long as the recommendations of the FSFEIS are followed, the above-mentioned criteria will be satisfied.

Wildlife Habitat

1). Management Plan, Wildlife Habitat, GMA Policy 7, page I-104 states:

Proposed uses that would adversely affect sensitive wildlife areas or sites shall be prohibited. Uses adversely affect wildlife sites and areas when they compromise the integrity of an area or site, or occur during the time of year when affected wildlife species are sensitive to disturbance.

Findings: Management Plan Table 4 (page I-129) and Table 6 (page I-132) sensitive wildlife areas or sites that need to be addressed are Bald eagle habitat, osprey sites, shallow water fish habitat (Columbia River) waterfowl area and western pond turtle habitat. Per the following findings and condition, the proposal would not adversely affect sensitive wildlife sites or areas.

Bald eagle habitat: A limited number of bald eagles use Northwestern Lake and the river below the dam during the winter season. U. S. Fish and Wildlife Service has determined the area is a low use area for bald eagles that do not use the area for nesting. Dam removal affects are

expected to be minor; prey base will shift from river and Northwestern Lake to river only. Increased anadromous fish carcasses in the river will enhance food supply.

Osprey sites: Northwestern Lake and river below the dam are osprey foraging areas. The RW Beck study reported a nest site .5 mile west of the dam, locating the site outside of the Scenic Area. Sites outside of the Scenic Area cannot be protected under Scenic Area provisions. However, while the nest site is far enough away from the dam (more than .25 mile), it is recommended that blasting and other disruptive activities should not occur during nesting periods. Prey base would shift from Northwestern Lake to the restored river environment.

Shallow water fish habitat (Columbia River): There is shallow water habitat on the Columbia River at the mouth of the White Salmon River. Sediment flushing will have short-term impacts on this habitat due to turbidity and sediment deposition. Long-term effects would be positive as sediments would have a more natural slope angle and be more like natural occurrences at tributary river mouths along the Columbia River shoreline.

Waterfowl area: The 4.6 acres of Northwestern Lake within the Scenic Area do provide waterfowl habitat. This area would change to riverine habitat. The riverine habitat would be a gain for flowing water species. The loss of the 4.6 acres for surface-feeding waterfowl is not considered significant, surface-feeders would likely shift to the lower White Salmon River area above the mouth (personal communication WDFW David Anderson/Jurgen Hess).

Western pond turtle: Sightings of Western pond were reported on 2 occasions (1993, Garrett, PacifiCorp and 1995, Larson, Forest Service). Washington Department of Fish and Wildlife (WDFW) has conducted 3 surveys for Western pond turtles; one in 1996 and 2 in 1997. The WDFW did not observe any pond turtles during those surveys; biologist letters submitted with this consistency review. According to WDFW District Biologist David P. Anderson, Northwestern Lake is not suitable habitat for recovery of the species (personal communication David Anderson with Jurgen Hess 2/26/02) due to low water temperatures and lack of developed aquatic vegetation. Flood damage in 1996 to the dam would have altered any pond turtle habitat if there were any along shorelines. According to Mr. Anderson, if there are any turtles at the Lake they were likely placed there some time ago, as the Lake is not suitable habitat. However Mr. Anderson recommends that a trapping program be initiated 2 years prior to dam removal just in case there may be individual turtles in the Lake area. If trapping finds any turtles, they should be moved to a more suitable habitat. The trapping and relocation to suitable habitat has been included as a recommended mitigation measure in the FSFEIS.

2). Management Plan, Wildlife Habitat, GMA Policies 11, page I-105 states:

Rehabilitation and/or enhancement shall be required to offset unavoidable impacts to wildlife habitat that result from new uses.

Findings: See findings above for item # 1).

3). Management Plan, Wildlife Habitat, GMA Guidelines, Uses Allowed Outright 1. E., page I-105 states:

Fish and wildlife management uses conducted by federal, state, or Indian tribal resource agencies.

Findings: Settlement Agreement proposal implementation will be undertaken not only by PacifiCorp but also a number of federal and state agencies and the Yakama Indian Nation.

- 4). Management Plan, Wildlife Habitat, GMA Guidelines, Approval Criteria for Review Uses Near Sensitive Wildlife Areas and Sites 1, page I-106 states:

Uses that are proposed within 1,000 feet of a sensitive wildlife area of site shall be reviewed by the Oregon Department of Fish and Wildlife or the Washington Department of Wildlife. The approximate locations of sensitive wildlife areas and sites are shown in the wildlife inventory. State wildlife biologists will help determine if a new use would adversely affect a sensitive wildlife area or site.

Findings: The WDFW has reviewed the Settlement Agreement proposal and been involved with mitigation recommendations.

- 5). Management Plan Wildlife Habitat GMA Guidelines, Approval Criteria for Review Uses Near Sensitive Wildlife Areas and Sites 2-3, page I-106 to I-108.

Findings: These guidelines have been addressed sufficiently through the consultation process between PacifiCorp and the WDFW.

- 6). Management Plan, Wildlife Habitat, GMA Guidelines, Wildlife Management Plans 1, page I-108 states:

Wildlife management plans shall be prepared when a proposed use is likely to adversely affect a sensitive wildlife area or site....

Findings: The Settlement Agreement proposal will not adversely affect a sensitive wildlife area or site (see item 1) above).

Rare Plants

Two plant species are state listed as sensitive: Oregon Bolandra, and Diffuse Stickweed. Within the Scenic Area, these sensitive plants are located at sites along a 1.4 mile stretch along the river below the dam: Bolandra 14 sites, Stickweed 4 sites. The plants are on located on high cliff faces above the river.

- 1). Management Plan, Rare Plants, GMA Policy 5, page I-112 states:

Except for uses allowed outright, new uses shall be prohibited within sensitive plant species buffer zones.

Findings: Proposed dam and other facility removal will not be within the 200' buffer zone of sensitive plants.

2). Management Plan, Rare Plants, GMA Guideline, Review Uses 1 states:

Except uses allowed outright, proposed uses may be allowed within 1,000 feet of a sensitive plant, subject to compliance with guidelines for the protection of scenic, natural, cultural, and recreation resources and "Approval Criteria for Review Uses Near Sensitive Plants" in this section.

Findings: This Guideline was addressed in the March 1, 1996 consistency determination and no change or revision of that finding is required based on the Settlement Agreement proposal. Dam and facility removal are within 1000' of sensitive plants.

3). Management Plan, Rare Plants, GMA Guidelines Approval Criteria for Review Uses Near Sensitive Plants 1, page I-113 states:

Uses that are proposed within 1,000 feet of a sensitive plant shall be reviewed by the Oregon or Washington Natural Heritage Program. The approximate locations of sensitive plants are shown in the rare plant species inventory. State heritage staffs will help determine if a new use would invade the buffer zone of sensitive plants.

Findings: The intent of this guideline is to determine locations of sensitive plants. PacifiCorp consultants have done a detailed plant survey; therefore this guideline has been addressed.

4). Management Plan, Rare Plants, GMA Guidelines, Sensitive Plant Buffers 1 page I-114, states:

A 200-foot buffer zone shall be maintained around sensitive plants. Buffer zones shall remain in an undisturbed, natural condition.

Findings: The March 1, 1996 Forest Service consistency determination found that no new uses are within sensitive plant buffer zones. That finding is also true for the Settlement Agreement proposal. Dam and related facility removal are outside of the sensitive plant buffer zones. Sensitive plants below the dam potentially affected by the release of waters and sediments are on cliffs above the river. The elevation and duration of waters flushed from Northwestern Lake would be similar to a natural occurring significant flood event in the river corridor below the dam. The flushing action would not cause permanent more than moderate adverse affects to sensitive plants. Plant populations would maintain viability.

Recreation Resources

The Settlement Agreement dam removal proposal does not include any new recreation developments in the project area within the Scenic Area. The Scenic Area boundary is just north

of the line of floats upstream of the dam in Northwestern Lake, .8 acre of the lake within the Scenic Area is available for boating. Approximately 2/3's of the fore bay boat ramp is within the Scenic Area. Northwestern Lake recreation will change to white water rafting and kayaking.

The Management Plan does not have any GMA recreation resource protection guidelines. There is one policy, GMA Policy 1 that deals with establishment of buffers from adjacent new development to protect recreation, but this policy is not applicable to the proposal. Most of the Plan's specific recreation direction is applicable to new development. The only relevant GMA recreation resource protection direction is the following goal:

1). Management Plan Goal 1, page I-145 states:

Protect and enhance recreation resources consistent with Indian treaty rights.

Findings: Plan goals are broad statements of policy that provide general direction and do not include specific criteria, as do the Plan guidelines. Nevertheless, this goal is addressed and the Settlement Agreement proposal is consistent with this goal. Removal of Northwestern Lake will create shifts in recreation supply and usage. Within the Scenic Area, .8 acres of available lake surface will change to a river environment. Dam removal activities would disrupt recreation activities, due to construction and sedimentation short-term impacts. However, as a free flowing river is restored, lake boating and parking at the fore bay boat ramp will be replaced with river rafting and kayaking.

River shoreline fishing will be enhanced with removal of the dam, surge tank, pipeline and penstock, as shore access will not be blocked by those structures. River bank fishing below the dam is expected to increase as anadromous fish move into and through that area.

Sedimentation at the mouth of the White Salmon River will change fishing patterns in that area. Boating is expected to shift to the Columbia River at the White Salmon mouth, as sedimentation will affect boating patterns north of SR 14. Bank fishing will likely increase on the White Salmon River east bank, north of SR 14 and adjacent to Highway 141, dependent on seasonal water depths along that shoreline. Bank fishing is also likely to increase on the Columbia River shoreline just downstream of the White Salmon River outlet south of the railroad tracks.

Dam removal will make available 2.5 miles of white water below the dam and 500 lineal feet of white water within the Scenic Area in the area of the dam and lake removal.

Treaty Rights

Sedimentation from dam removal will have a significant affect on the Underwood in-lieu site at the mouth of the White Salmon River. The Settlement Agreement provides measures to mitigate that affect. The SA includes a \$500,000 fund for enhancement, maintenance or other use of the in-lieu site or other in-lieu sites owned and managed by the United States for the Yakama Nation, the Confederated Tribes of the Warm Springs Reservation, the Confederated Tribes of

the Umatilla Reservation and the Nez Perce Tribe for fishing purposes. The Tribes will administer the enhancement fund.

The Settlement Agreement also provided for \$1 million PacifiCorp funding to the Yakama Nation for White Salmon River Basin fishery resource enhancement, supplementation and conservation.

1). Management Plan, GMA Policies 4, page IV-26 states:

Proposed uses that would affect or modify treaty or other rights of any Indian tribe shall be prohibited.

Findings: Plan Guidelines provide for tribal consultation as a means of dealing with the affect of projects on treaty rights. The Settlement Agreement has resulted in measures that when applied will result in the proposal not affecting treaty rights. The SA proposal will also result in long-term enhancement of anadromous fisheries in the White Salmon River watershed that are an important part of treaty rights.

2). Management Plan, GMA Guidelines, Treaty Rights page IV-26 to 28:

Findings: The GMA Treaty Rights Guidelines address processes and procedures directed at local governments implementing local land use ordinances. The Forest Service is not a local government implementing local ordinances. Furthermore, unlike a local government, the Forest Service cannot regulate land uses or make decisions to prohibit land uses as directed by the Plan Guidelines. The Forest Service is rather providing a consistency determination to the FERC. However, the Settlement Agreement proposal has substantially met the intent of the GMA Guidelines by means of PacifiCorp notifying the 4 Treaty Tribes of the proposed actions and consulting with the Tribes through the relicensing and Settlement Agreement discussions and consultations.

Economy

Rationale for No Findings

The Scenic Area Act's second purpose addresses the Columbia River Gorge economy:

(2) to protect and support the economy of the Columbia River Gorge area by encouraging growth to occur in existing urban areas and by allowing future economic development in a manner consistent with paragraph (1) (note: paragraph (1), the Act's first purpose, deals with resource protection and enhancement)

The second purpose direction is fulfilled by economic development grants and Management Plan direction for land use guidelines. The Scenic Area Act included specific standards for implementing the Act's first purpose in Section (6)(d); the second purpose implementation

direction is found in the Act's Section 11 dealing with economic studies and grant funding and certification.

Recognizing the Act's focus for economic development, the Columbia River Gorge Commission included direction in the Management Plan dealing with land use allocations, economic development fund granting and certification and economic enhancement. The Management Plan does not include policies and guidelines for development review for economic resource protection similar to scenic, cultural, natural or recreation resource protection. Therefore this consistency review does not include findings dealing with the economy. The FERC does have an economic evaluation in its PSFEIS.

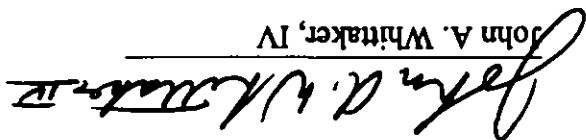
Relationship to Laws and Policies

Section 5.5 of the FERC PSFEIS includes a number of federal acts that the FERC decision must comply with. Section 14 (d) of the Columbia River Gorge National Section Area Act (PL99-663) requires that "...Federal agencies having responsibilities within the scenic area shall exercise those responsibilities consistent with the provisions of this Act as determined by the Secretary." The Secretary of Agriculture has delegated the role of consistency determination to the Forest Service. Consistency with the National Scenic Area had been left out of Section 5.5 of the DSFEIS, however, this oversight has been fixed in Section 5.5 of the PSFEIS.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document on the parties designated on the official service list compiled by the Secretary in this proceeding.

Dated at Washington, D.C., this 14th day of November 2005.



John A. Whittaker, IV

Certificate of Service

I hereby certify that on August 30, 2002, I served true copies of the foregoing USDA Forest Service Columbia River Gorge National Scenic Area Consistency Determination on Condit Hydroelectric Project, FERC No. 2342-011 Final Supplemental Final Environmental Impact Statement by first-class mail, postage prepaid, to each person designated on the FERC website service list as of today's date in this proceeding.

DATED this 30th day of August 2002 at Hood River, Oregon.



**Steve Grichel
Planner
USDA Forest Service
Columbia River Gorge National Scenic Area
902 Wasco Avenue
Hood River, OR 97031**